Supreme Court, U.S.
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No. 92-762

In the Supreme Court of the United States

OCTOBER TERM, 1992

DIANA M. MAULDING, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in reviewing the final decision of the Merit Systems Protection Board under the "arbitrary and capricious" standard.

2. Whether the courts below overlooked credibility determinations made by the ALJ.

3. Whether the courts below erred in concluding that petitioner did not sustain her burden of showing that she was handicapped within the meaning of the Rehabilitation Act.

4. Whether the court of appeals erred in not explicitly addressing petitioner's Privacy Act claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 961 F.2d 694. The opinion of the district court (Pet. App. 29-63) is not reported. The opinion of the Merit Systems Protection Board (Pet. App. 64-91) is reported at 42 M.S.P.R. 605. The opinion of the administrative law judge (Pet. App. 92-151) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1992. A petition for rehearing was denied on May 5, 1992. The petition for a writ of certiorari was

filed on August 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Center for Toxicological Research, a division of the Public Health Service within the Department of Health and Human Services, terminated petitioner's employment on August 27, 1988. The Merit Systems Protection Board (MSPB) sustained the termination. Pet. App. 64-91. Petitioner filed a complaint in the United States District Court for the Eastern District of Arkansas seeking to reverse that decision. The district court upheld the MSPB's decision. *Id.* at 29-63. The court of appeals affirmed. *Id.* at 1-28.

1. Petitioner began her employment with the Public Health Service in 1976. Pet. App. 2. She worked as a laboratory chemist from 1976 until December 1980. *Id.* at 2-3. In 1980, she was assigned to a pharmacology position in the Office of Scientific Intelligence, which later became part of the Division of Comparative Toxicology. *Id.* at 3. In this new position, petitioner worked in an office rather than a laboratory. *Ibid.*

When Dr. Lionell Poirier became Director of the Division of Comparative Toxicology in early 1987, he spoke to each member of his staff regarding the Division's transition from "paper" research to laboratory research. Pet. App. 3. When Dr. Poirier spoke with petitioner, petitioner said she would not work in the laboratory because of an alleged allergy to certain chemicals. *Id.* at 3-4. Petitioner had never complained to her supervisors about breathing or pulmonary

problems during the more than four years she had worked as a chemist in a laboratory. *Id.* at 3.

Persisting in her claim that health considerations prevented her from doing laboratory work, petitioner in early 1988 requested part-time work outside the laboratory. Pet. App. 4. Dr. Poirier denied her request in February 1988, at which time he asked petitioner to produce specific and current information about her alleged allergies that would support her request to be excused from laboratory work. *Id.* at 4-5. Dr. Poirier informed petitioner that, pursuant to the regulations of the Office of Personnel Management, her request would be reviewed by Dr. George Smith, the agency's medical advisor. *Id.* at 5.

Petitioner submitted a 1985 letter from Dr. Alvin Strauss recommending she not be assigned to the laboratory; the letter was not accompanied by any documentary explanation for his recommendation. Pet. App. 5, 25 n.2. Petitioner also submitted a memorandum prepared by Dr. Poirier listing the chemical compounds that might be present in the laboratory. *Id.* at 5-6. After reviewing these documents, Dr. Smith concluded in a March 25, 1988, memorandum that "without clinical records to document the existence of a medical condition that warrants restriction from specific chemical exposure, and documentation that such exposures are likely to occur * * * there is no medical basis upon which to recommend approval of her request." *Id.* at 6-7.

On April 8, 1988, Dr. Poirier assigned petitioner to work in the laboratory, but petitioner did not report as requested. Pet. App. 7. Dr. Poirier again directed petitioner to report to the assigned laboratory job on

April 13, 1988. *Ibid.* Petitioner reported to work for about two hours but did not enter the laboratory. *Ibid.* Accordingly, Dr. Poirier charged her with absence without leave for two days because petitioner had no approved excuse for her absence from the laboratory. *Id.* at 7-8.

Dr. Smith then granted petitioner's request for more time to supply medical documentation supporting her health claims. Pet. App. 8. After reviewing additional information provided by petitioner, Dr. Smith again determined that the records did not sufficiently indicate petitioner had any lung or respiratory ailment other than the allergies she had always had. *Id.* at 9. Dr. Smith reiterated that petitioner failed to carry her burden. *Ibid.*

Dr. Poirier directed petitioner to report to the laboratory on May 11, 1988, and again petitioner refused. Pet. App. 9. Beginning May 16, 1988, petitioner neither reported for work nor requested leave. *Ibid.* On June 21, 1988, Dr. Poirier wrote petitioner and asked her to notify him by June 28, 1988, of her intentions with respect to her assigned job. *Id.* at 9-10. Petitioner did not respond, and on July 15, 1988, Dr. Poirier informed petitioner that he proposed to remove her from federal service. *Id.* at 10. Petitioner was notified of her right to respond but failed to do so. *Ibid.* The Deputy Director of the National Center for Toxicological Research then notified petitioner of her removal, effective August 27, 1988, for failure to follow written instructions and for absence without leave. *Ibid.*

2. On September 20, 1988, petitioner appealed her removal to the Merit Systems Protection Board

(MSPB), alleging that the agency constructively discharged her. Pet. App. 10. Petitioner also argued that she was fired in retaliation for whistleblowing, see 5 U.S.C. 2302(b)(8)-(9); on account of her gender, see 5 U.S.C. 2302(b)(1)(A); and on account of her alleged handicap, see 5 U.S.C. 2302(b)(1)(D). Pet. App. 10-11. The administrative law judge (ALJ) rejected petitioner's claims that the discharge was in retaliation for whistleblowing or on account of gender. *Id.* at 109, 114. The ALJ reversed the agency's decision to discharge petitioner, however, because: (1) the agency's insistence on receiving clinical medical evidence to support petitioner's request to be relieved of lab work (as required by 5 C.F.R. 339.101) was "a violation of fundamental fairness"; and (2) petitioner was handicapped within the meaning of the Rehabilitation Act, 29 U.S.C. 706, and the agency had failed to reasonably accommodate her handicap. Pet. App. 104, 120.

3. The agency appealed and the Board found in its favor. Pet. App. 12. The Board found that petitioner's absence from duty was not justified; that petitioner had not met her burden under 5 C.F.R. 339.101 to provide adequate medical documentation that would excuse her from laboratory work; and that petitioner was not handicapped under the Rehabilitation Act. Pet. App. 12.

4. Petitioner filed a complaint in the district court for the Eastern District of Arkansas seeking to overturn the MSPB's decision. Pet. App. 12, 30. The district court concluded that the Board's decision that petitioner was properly dismissed for absence from duty was "neither arbitrary nor capricious nor

an abuse of discretion" and "was supported by substantial evidence." *Id.* at 45. The district court found that the decision that petitioner was not dismissed in retaliation for whistleblowing was "supported by substantial evidence and * * * not arbitrary, capricious or an abuse of discretion." *Id.* at 44-45. Engaging in *de novo* review, *id.* at 46, the court found that petitioner "has shown no intention on the part of the defendant to discriminate on the basis of sex." *Id.* at 48-49. As to petitioner's handicap discrimination claim, the court found that petitioner "has failed to establish a sensitivity to chemicals." *Id.* at 52. Thus, the district court found that "she is not a handicapped person within the meaning of 29 C.F.R. Sec. 1613.702(a)." *Id.* at 53. Finally, the court rejected petitioner's allegation that the Privacy Act was violated because she was required to submit personal information to support her claim and because Dr. Poirier informed a caller seeking petitioner that she was "AWOL." *Id.* at 56-62. The court thus upheld the MSPB's decision.

5. The court of appeals affirmed. Pet. App. 1-28. With respect to petitioner's claims that the termination was unjustified and in retaliation for whistleblowing, the court of appeals concluded that the MSPB's decision "was neither arbitrary nor capricious nor an abuse of discretion" and "agree[d] with the district court that 'the decision of the Board was supported by substantial evidence.' " *Id.* at 20 (quoting *id.* at 45). The court concluded that petitioner "supplied insufficient evidence of sex discrimination under Title VII" and found "no clear error in the district court's conclusion in this regard." *Id.* at 13.

The court further concluded that "it was not error to reject [petitioner's] claim of handicap discrimination on the basis of failure to carry the burden of proof." *Id.* at 18.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioner argues (Pet. 27-39) that the courts below erred in reviewing the final decision of the MSPB rather than the action of the employing agency, HHS. The courts properly reviewed the MSPB's decision. Section 7703 of Title 5 is entitled "Judicial review of decisions of the Merit Systems Protection Board" and provides for judicial review of "a final order or decision of the Merit Systems Protection Board." Section 7703(c) provides the standard for judicial review of MSPB decisions. Petitioner correctly notes that Section 7703(c) mentions "agency action," but the language and structure of the provision—which provides for judicial review of MSPB decisions—make clear that the "agency" to which Section 7703(c) refers is the MSPB.

Petitioner's underlying concern seems to be that courts, by reviewing MSPB decisions, will allow agency employment decisions to evade judicial review. See Pet. 30-31. That concern is misplaced. To analyze an MSPB decision, the reviewing court will, of course, have to examine the record and the agency employment decision in question to determine the propriety of the MSPB decision. This case is a good

illustration. In reviewing the MSPB's decision, the courts below extensively examined the facts underlying petitioner's termination to determine whether the MSPB's decision should be affirmed. See Pet. App. 19-24; *id.* at 31-45.

Petitioner also argues (Pet. 30-31, 40-43) that the courts below erred by reviewing the final decision of the MSPB instead of the ALJ's decision. But, as noted above, 5 U.S.C. 7703(a)(1) provides for judicial review of "a *final* order or decision of the Merit Systems Protection Board" (emphasis added). The decision by the Board itself, not the decision of the ALJ, is the final decision of the MSPB.

2. Relying on *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), petitioner contends that the courts below improperly overlooked the ALJ's factual findings. There is no merit to that contention.

In *Universal Camera*, this Court held that the factual findings of a Board examiner, and not only those of the Board as a whole, may be considered by the reviewing court. 340 U.S. at 496-497. In reaching that conclusion, the Court reasoned that review under the "substantial evidence" standard requires the reviewing court to consider the examiner's findings where credibility is the crucial issue. In this case, however, the Board's reversal of the ALJ's decision turned on its assessment of the adequacy of the medical evidence petitioner submitted to her supervisors concerning her alleged allergies. See Pet. App. 70-79. Thus, the issue was not a matter of credibility; the sole issue was whether the documentation petitioner submitted was sufficient to establish the alleged medical condition.

3. Petitioner contends (Pet. 45-47) that the district court and the court of appeals erred in concluding that she did not sustain her burden of showing she was handicapped. The Rehabilitation Act requires petitioner to demonstrate that she "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B)(i)-(iii).[1] The district court and the court of appeals correctly stated that the initial burden is on the claimant to show the existence of a handicap. See *Jasany* v. *United States Postal Service*, 755 F.2d 1244, 1248 (6th Cir. 1985); see also *Gilbert* v. *Frank*, 949 F.2d 637, 640 (2d Cir. 1991); *Forrisi* v. *Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); cf. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981).

The courts below properly concluded that petitioner failed to meet her burden. Pet. App. 18, 52. Petitioner never submitted appropriate medical documentation to show that she was sensitive to chemicals (and thus had a physical "impairment") to the agency, the ALJ, the Board, or the courts. As the Board concluded: "[T]he evidence presented by [petitioner] consisted mostly of her own subjective reports of sensitivity to chemicals. The medical

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[1] Petitioner claims (Pet. 45-47) that the lower courts ignored the second and third prongs of the Rehabilitation Act's definition. But petitioner tendered evidence to show that she *had* a physical impairment, not that she had a record of having such an impairment or that she was regarded as having such an impairment.

evidence presented relied on [petitioner's] own statements of chemical sensitivity or related to other medical problems not germane to such sensitivity." *Id.* at 77-78. The Board, the district court, and the court of appeals all correctly concluded that the evidence submitted by petitioner was insufficient to satisfy her threshold burden of showing she was sensitive to chemicals and thus handicapped. *Id.* at 18, 52, 78-79.[2]

Petitioner also contends (Pet. 43-44), relying on *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980), that the court of appeals should have determined whether her refusal to perform laboratory work was "reasonable," not whether it was justified by medical evidence. In our view, her refusal was unreasonable because it was not justified by medical evidence. Moreover, *Whirlpool*, a case involving the Occupational Safety and Health Act, has little apparent relevance to petitioner's Rehabilitation Act claim.

4. Petitioner argues that a "fair reading of [28 U.S.C.] 1291 is that the entirety of the final decision [of the district court] is before the Court of Appeals and the Court of Appeals must address all issues within that final decision." Pet. 49. Petitioner contends she was denied the review mandated by

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[2] Moreover, as the court of appeals stated, petitioner's alleged ailment "would prevent her only from lab work, and * * * such a limitation does not substantially limit her employment as a whole." Pet. App. 17-18; see *Byrne* v. *Board of Education*, No. 91-1113 (7th Cir. Nov. 10, 1992), slip op. 8 ("It is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally.").

Section 1291 insofar as the court of appeals did not explicitly address her Privacy Act claims. The district court analyzed and rejected those claims, Pet. App. 56-62, and its findings are supported by the record. In its opinions, the courts of appeals need not explicitly discuss every issue raised by an appellant. The fact that the court of appeals in this case found petitioner's Privacy Act claims even less meritorious than her other claims, and therefore rejected them without discussion, does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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